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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 DeWayne Brian Wheeler,

10 Petitioner,

11 v.

12 Attorney General of the State of Arizona, et
13 al.,

14 Respondents.

No. CV-19-04897-PHX-DJH (DMF)

ORDER

15 Before the Court is Petitioner's unopposed Motion for Stay and Abeyance
16 ("Motion to Stay") (Doc. 4) and the Report and Recommendation ("R&R") issued by
17 Magistrate Judge Deborah M. Fine on December 10, 2019 (Doc. 13). On December 16,
18 2019, Petitioner filed a "Motion to Lift or Disregard Stay and Abeyance" (Doc. 14),
19 which Judge Fine construed as an objection to the R&R's recommendation that the stay
20 be granted pending issuance of the mandate regarding Petitioner's post-conviction review
21 proceedings (Doc. 15).

22 **I. Background**

23 In his Motion to Stay, Petitioner asks that his Petition be stayed until he has
24 exhausted the basis for the claims advanced in Ground Two of his *pro se* Petition for Writ
25 of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition") (Doc. 4). Respondents do
26 not oppose Petitioner's requested stay. (Doc. 12). In her R&R, Magistrate Judge Fine
27 finds that good cause exists to stay Petitioner's case, and recommends, among other
28 things, that "within thirty days of the [state court] mandate issuing, Respondents and

1 Petitioner shall file a new report regarding the status of the state court proceedings.”
2 (Doc. 13 at 5).

3 Six days after she issued her R&R, and before this Court could review the R&R
4 recommending the stay, Petitioner sought to lift or disregard the stay. (Doc. 14 at 3-4).
5 Magistrate Judge Fine construed Petitioner’s filing as an Objection to the R&R.
6 (Doc. 15).

7 **II. Discussion**

8 The district judge “shall make a *de novo* determination of those portions of the
9 report or specified proposed findings or recommendations to which objection is made.”
10 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b)(3) (“The district judge must
11 determine *de novo* any part of the magistrate judge’s disposition that has been properly
12 objected to.”); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (same). The judge “may
13 accept, reject, or modify, in whole or in part, the findings or recommendations made by
14 the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

15 Petitioner does not make a traditional objection to a fact or finding in the R&R,
16 but appears to be alerting the Court to the fact that his PCR claims have now been
17 exhausted in the Arizona courts and thus the requested stay is no longer necessary and/or
18 can be lifted.¹ Magistrate Judge Fine construed Petitioner’s notice as an objection to her
19 recommendation that the stay be granted only “pending the issuance of the mandate
20 regarding Petitioner’s PCR proceedings.” (Doc. 13 at 5). As she notes in her Order,
21 though Petitioner’s Objection references the Arizona Appeals Court’s decision on his
22 PCR proceedings, he does not reference a mandate, and Respondents have been silent on
23 the issuance of the same. (Doc. 15). The Court appreciates Petitioner’s efforts to inform
24 the Court as to the status of his PCR proceedings, but understands the prudence of
25 requiring evidence of a mandate before lifting a warranted stay. The Court will therefore
26 overrule Petitioner’s Objection and adopt the R&R, but with the additional requirement
27 that if a mandate has already issued in Petitioner’s PCR proceedings, that Petitioner and

28 ¹ The Court notes that on December 16, 2019, at the time of Petitioner’s filing, there was
no stay to lift, as this Court had yet to adopt Magistrate Judge Fine’s R&R.


1 Respondents file a report within 14 days of this Order so informing the Court.

2 Accordingly,

3 **IT IS ORDERED** that Magistrate Judge Fine's R&R (Doc. 13) is **ACCEPTED**
4 **AND ADOPTED** as the Order of this Court. Petitioner's Motion for Stay (Doc. 4) is
5 **GRANTED.**

6 **IT IS FURTHER ORDERED** that as recommended in the R&R, Petitioner and
7 Respondents must file a report informing the Court of the status of the state court
8 proceedings no later than 30 days after the date of service of this Order adopting this
9 Report and Recommendation, and every 90 days thereafter. Petitioner and Respondents
10 must also file a report informing this Court within 30 days after the mandate is issued in
11 Petitioner's PCR proceedings, or if 30 days have passed since its issuance, within 14 days
12 of this Order.

13 Dated this 10th day of March, 2020.

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16 Honorable Diane J. Humetewa
17 United States District Judge
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